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Revocable Trust; Trustees of The William E. and Desiree B. Moore

Revocable Trust; Desiree B. Moore Revocable Trust;

William E. Moore Marital Trust; William E. Moore

Generation-Skipping Trust; and Desiree Moore

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO AND OAKLAND DIVISION

THOMAS FERNANDEZ, LORA SMITH and
TOSHA THOMAS, individually and on behalf of
a class of all other persons similarly situated,

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC.; K-M
INDUSTRIES HOLDING CO., INC. ESOP
PLAN COMMITTEE; WILLIAM E. AND
DESIREE B. MOORE REVOCABLE TRUST;
TRUSTEES OF THE WILLIAM E. AND
DESIREE B. MOORE REVOCABLE TRUST;
CIG ESOP PLAN COMMITTEE; NORTH
STAR TRUST COMPANY; DESIREE B.
MOORE REVOCABLE TRUST; WILLIAM E.
MOORE MARITAL TRUST; WILLIAM E.
MOORE GENERATION-SKIPPING TRUST;
and DESIREE MOORE, BOTH IN HER
INDIVIDUAL CAPACITY AND AS TRUSTEE
OF THE WILLIAM E AND DESIREE B.
MOORE REVOCABLE TRUST'S SUCCESSOR
TRUSTS NAMED ABOVE,

Defendants.

Case No. C 06-07339 CW

**WILLIAM E. AND DESIREE B.
MOORE REVOCABLE TRUST,
TRUSTEES OF THE WILLIAM E.
AND DESIREE B. MOORE
REVOCABLE TRUST, DESIREE B.
MOORE REVOCABLE TRUST,
WILLIAM E. MOORE MARITAL
TRUST, WILLIAM E. MOORE
GENERATION-SKIPPING TRUST,
AND DESIREE B. MOORE'S
OPPOSITION TO PLAINTIFFS'
ADMINISTRATIVE MOTION TO
EXTEND THE PAGE LIMIT FOR
OPPOSITIONS TO DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT**

Pursuant to Local Rule 7-11(b), Defendants William E. and Desiree B. Moore Revocable Trust, Trustees of the William E. and Desiree B. Moore Revocable Trust, Desiree B. Moore Revocable Trust, William E. Moore Marital Trust, William E. Moore Generation-Skipping Trust and Desiree B. Moore (the "Moore Trust Defendants") oppose Plaintiffs' Administrative Motion to Extend the Page Limit for Oppositions to Defendants' Motions for Summary Judgment.

Instead of complying with Local Rule 7-3(a) and opposing each Defendants' motion for summary judgment in a brief of 25 pages or less, Plaintiffs request to combine their opposition to the KMH Defendants' motion¹ and the Moore Trust Defendants' motion in a super-sized 40-page brief. To justify this departure from the rules, Plaintiffs point out that many of the arguments raised by the KMH Defendants and the Moore Trust Defendants overlap. This is hardly surprising considering these summary judgment motions were limited solely to the untimely nature of Plaintiffs' lawsuit. Any such overlap, however, does not justify permitting Plaintiffs to consolidate their oppositions, and instead would counsel *against* permitting Plaintiffs a 40-page response to two 17-page and 18-page briefs in which, as Plaintiffs admit, some of the legal issues overlap.

Indeed, though the legal issues presented in the KMH Defendants' motion and the Moore Trust Defendants' motion may overlap, the application of the law to the unique factual circumstances of these parties is different. Should Plaintiffs attempt to escape the six-year statute of repose by arguing the "fraud or concealment" exception to that statute (as defendants expect they must, as otherwise their claims are barred), *Barker v. American Mobil Power Corp.*, 64 F. 3d 1397, 1402 (9th Cir. 1995) requires proof that "the defendant *himself* has taken steps to hide his breach," by fraud or by concealment so that the beneficiary never becomes aware of the breach. Plaintiffs may not use fraudulent concealment by one defendant as a means to toll the statute of limitations against any other defendant. *Id.* Accordingly, if Plaintiffs intend to attempt to avoid the six-year statute of repose by using the "fraud or concealment" exception, Plaintiffs must address separately the evidence they have (or lack thereof) with respect to each defendant, and separately address each

¹ The KMH Defendants include K-M Industries Holding Co., Inc., K-M Industries Holding Co., Inc. ESOP Plan Committee and CIG ESOP Plan Committee.

1 of the defendants' legal arguments as they apply to that particular defendant. This separation is
 2 especially critical because at this juncture in the litigation, after the close of fact discovery, Plaintiffs
 3 still have never articulated in any detail—in their Complaint or in their discovery responses²—the
 4 factual basis for their allegations against any individual defendant. Instead, Plaintiffs have
 5 consistently addressed their contentions to the defendants as indistinct groups. Permitting Plaintiffs
 6 to consolidate their opposition to the KMH Defendants' motion and the Moore Trust Defendants'
 7 motion enables Plaintiffs to continue this practice and further frustrate the defendants' ability to
 8 understand and respond to the specific claims and underlying facts Plaintiffs allege against them. In
 9 addition, the Trust Defendants (and Desiree Moore in her capacity as trustee of those trusts) are
 10 uniquely situated vis-à-vis Plaintiffs' claims because they are not alleged to have been fiduciaries to
 11 the Plan; thus, the facts must be analyzed differently as applied to them than for the defendants
 12 alleged to have been fiduciaries.

13 For the foregoing reasons, the Moore Trust Defendants respectfully request that this Court
 14 deny Plaintiffs' Administrative Motion to Extend the Page Limit, and require that Plaintiffs respond
 15 to each motion separately, within the normal page limitations.

16 DATED: July 2, 2008

HENNIGAN, BENNETT & DORMAN

17 By: 
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Caroline M. Walters

Attorneys for Defendants

19 WILLIAM E. AND DESIREE B. MOORE
 20 REVOCABLE TRUST; TRUSTEE OF THE
 21 WILLIAM E. AND DESIREE B. MOORE
 22 REVOCABLE TRUST; DESIREE B. MOORE
 23 REVOCABLE TRUST; WILLIAM E. MOORE
 24 MARITAL TRUST; WILLIAM E. MOORE
 25 GENERATION-SKIPPING TRUST; and
 26 DESIREE MOORE

27 ² See Second Amended Complaint (Corrected) (Docket No. 86) and Exhibits J, K and L to the
 28 Declaration of Caroline Walters in Support of Motion for Summary Judgment by Defendants
 William E. and Desiree B. Moore Revocable Trust, Trustees of the William E. and Desiree B.
 Moore Revocable Trust, Desiree B. Moore Revocable Trust, William E. Moore Marital Trust,
 William E. Moore Generation-Skipping Trust and Desiree B. Moore. (Docket No. 141).